IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14779

D.C. Docket No. 99-00136-CR-1-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DIANA HARVEY JOHNSON,
a.k.a., Diane Harvey Johnson,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

FILED
January 22, 2001

Before TJOFLAT, BARKETT and POLITZ*, Circuit Judges.

PER CURIAM:

Appellant Diana Harvey Johnson was indicted by a federal grand jury in the Northern District of Georgia on March 16, 1999. The indictment charged Johnson with five counts relating to fraud and the scheme to defraud, and the theft of honest services, in violation of 18 U.S.C. §§ 1341, 1346, and 2. The indictment charged Johnson with defrauding the State

---

* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

of Georgia and its citizens of their right to honest services as an elected state senator and defrauding them of their money and property through use of the United States mails.

A jury convicted Johnson on all five counts on July 21, 1999, specifically finding Johnson guilty under both the honest-services provision and the money-and-property provisions of the mail fraud statute. The district court held a sentencing hearing on November 5, 1999, and sentenced Johnson to 41 months' imprisonment on each count, to run concurrently.[1] On November 15, 1999, Johnson filed a timely notice of appeal.

Johnson raises five issues on appeal:

1) That the district court erred in failing to give the defendant's proffered special jury instructions on the honest-services provision of the mail fraud statute.

2) That the evidence was insufficient to support guilty verdicts on the various counts of the indictment.

3) That the mail fraud statute was unconstitutionally applied to impose a duty to disclose beyond that duty prescribed by state law.

4) That the indictment was multiplicitous in charging five counts of mail fraud.

5) That the district court erred in sentencing Johnson to 41 months' imprisonment, which is the high end of the Guideline range.

Johnson's assignments of error are without merit. The district court did not abuse its discretion in refusing to give two

---

[1] Johnson was also sentenced to three years' supervised release, ordered to pay a special assessment of $500.00, fined $7,500.00, and ordered to pay restitution in the amount of $21,606.00 to the State of Georgia's Office of Treasury and Fiscal Services.

requested jury instructions on the honest-services provision of the mail fraud statute. *See United States v. Paradies*, 98 F.3d 1266, 1284-87 (11th Cir. 1996). The evidence in this case was sufficient to support a guilty verdict, viewed in the light most favorable to the Government and resolving all reasonable inferences and credibility determinations in favor of the jury's verdict. *See United States v. Bailey*, 123 F.3d 1381, 1390 (11th Cir. 1997). The mail fraud statute was not unconstitutionally applied, as the duty owed under the honest services provision is a question of federal, not state, law. *See United States v. DeVegie*, 198 F.3d 1324, 1328-29 and n.5 (11th Cir. 1999). The indictment was not multiplicitous in charging five counts of mail fraud based on five separate mailings. *See United States v. Edmondson*, 818 F.2d 768, 769 (11th Cir. 1987).

Finally, the district court did not abuse its discretion in sentencing the defendant at the high end of the sentencing range; we generally do not review sentences within the guideline range, and we do not see a need to do so in this instance. *See United States v. Alamin*, 895 F.2d 13351,1337 (11th Cir. 1990).

AFFIRMED.